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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 487.

CANADA MALTING COMPANY, LTD.,
Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

No. 488.

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

No. 489.

HENRY K. STARNES, doing business as H. K. Starnes & Company,
Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

Statement.

These cases come before this Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted November 30, 1931 (R. 111-2).

By these writs the petitioners seek to review the decrees of the said court made on July 28, 1931 (R. 109-10), affirming the final decrees of the United States District Court for the Western District of New York, in admiralty, dismissing the libels herein, made on January 12, 1931 (R. 85, 89, 92).

Opinions Below.

The opinion of the District Court (R. 78) is officially reported as *Canada Malting Co.* v. *Paterson Steamships,* 49 F. (2d) 802.

The opinion of the District Court on application for a re-hearing (R. 84) is officially reported as *Canada Malting Co.* v. *Paterson Steamships,* 49 F. (2d) 804.

The opinion of the Circuit Court of Appeals (R. 104) is officially reported as *Canada Malting Co.* v. *Paterson Steamships,* 51 F. (2d) 1007.

Nature of the Proceeding.

These proceedings were instituted by the filing of libels *in personam,* in admiralty, with a clause of foreign attachment (R. 1, 2, 36, 41). Jurisdiction of the respondent under the libels of the Canada Malting Company, Ltd. and the British Empire Grain Company, Ltd. was obtained by seizure of respondent's steamship "Lachinedoc" in the port of Buffalo, and bonds were filed in order to procure her release (R. 1). In the case of Henry K. Starnes, the respondent filed a stipulation in lieu of attachment (R. 1). In each of the cases the respondent filed a general appearance (R. 2, 5, 39, 43).

Respondent's ownership of the "Mantadoc" is admitted (R. 9, 13).

By their libels the petitioners sought to recover for the loss of their cargo, laden on the steamer "Yorkton", through the sinking of that vessel in collision with respondent's steamer "Mantadoc", in Lake Superior, on the American side of the international boundary line, on July 9th, 1930 (R. 2, 36, 41).

Jurisdiction.

The jurisdiction of this Court is based on Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code Tit. 28, Sec. 347), and on Article III, Section 2, Clause 1, of the Constitution of the United States.

Issues Involved.

After filing bonds and appearing generally in the proceedings, the respondent, in each case, filed a motion to dismiss, exceptions and a suggestion that the court decline to entertain jurisdiction of the proceeding (R. 2, 5, 7, 8, 39, 102, 44, 45, 46). These motions, exceptions and suggestions were based upon the facts that the respondent and all of the petitioners were Canadian citizens; that both of the vessels involved were owned and registered in Canada; and that most of the officers and crew of the vessels were residents of Canada. It was also asserted that an action was brought by the respondent (apparently after the beginning of the present proceedings) against the owners of the "Yorkton" in Toronto, Canada (R. 12, 16, 19).

The District Court, in the exercise of a supposed discretion, dismissed the libels; and the Circuit Court of Appeals affirmed its decision (R. 79, 108).

It appears from the concurrent findings of both the lower courts that the collision occurred on the American side of the international boundary line and therefore within the territorial waters of the United States (R. 78, 104).

The libels charge that the navigators of the "Mantadoc"

> "were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog, in that she did not give proper heed to the signals of the steamer 'Yorkton', in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules" (R. 4, 37-8, 42).

These allegations, of course, are admitted by the exceptions, which are the equivalent of a demurrer. Accordingly, for the purposes of this appeal, the fault of the "Mantadoc" must be taken as admitted. Indeed, there appears to be no dispute on this point, as the respondent, in support of its suggestions, put in evidence the report of the Dominion Wreck Commissioner, in which both vessels were held at fault (R. 30, 64-65). This report fully supports the charges of negligence on the part of the navigators of the "Mantadoc", as set forth in the libels.

That the District Court had jurisdiction both of the respondent and of the subject matter of the litigation, is undisputed.

Accordingly, this appeal presents only issues of law, namely, whether the maritime law of the United States applies to the waters of the Great Lakes on the American side of the international boundary; and whether a District Court has discretion to decline to exercise the jurisdiction conferred upon it by the Constitution and laws of the United States, over a maritime tort committed within United States territorial waters.

POINT I.

The Circuit Court of Appeals erred in holding that the rights and obligations of litigants with respect to a collision between two vessels in the waters of the Great Lakes on the American side of the international boundary should be determined by the law of their common flag as though the collision had occurred on the high seas outside the territorial limits of the United States.

That the collision occurred on the American side of the international boundary line is clear. On this point the District Court said:

> "On the night of July 9th, 1930, the steamers 'Yorkton' and 'Mantadoc' collided in Whitefish Bay, Lake Superior within the territorial waters of the United States" (R. 78).

The Circuit Court of Appeals said:

> "The collision was alleged to have been caused by faults of the 'Mantadoc'. It occurred in Lake Superior on the American side of the international boundary, and the 'Yorkton' was so badly damaged that she sank, her cargo becoming a total loss" (R. 104).

Nevertheless, the Circuit Court of Appeals said:

> "If the collision had occurred on the high seas, there can be no doubt that the retention of jurisdiction would be a matter of discretion. When two vessels of the same nationality collide upon the high seas the law enforced by the forum will be the law of the flag. *The Scotland,* 105 U. S. 24, 29; *The Eagle Point,* 142 F. 453 (C. C. A. 3), cert. denied, 201 U. S. 644. Under the terms of the treaty between Great Britain and the United States (36 Stat. 2448) the waters of the Great Lakes are equally free to citizens of either Canada or the United States and we think collisions in those waters are to be dealt with as though on the high seas" (R. 107).

The statement last quoted involves more than an interesting question of international law; it involves a question of national sovereignty. To hold that the laws of the United States do not apply to the waters of the Great Lakes, on the American side of the international boundary, is a surrender, by judicial decision, of national jurisdiction acquired by force of arms. That sovereignty may be displaced is undoubted; but only in the same way in which it can be acquired, *i. e.,* by conquest or by treaty. Accordingly, the decision of the Circuit Court of Appeals can be sustained only on the theory that the United States has surrendered by treaty the exclusive national jurisdiction which it undoubtedly had at one time over all the waters of the Great Lakes on the American side of the international boundary line. Considering that the territory involved is approximately as large as the whole of New England, the importance of the question is obvious; and certainly the United States will not be deemed to have surrendered its national sovereignty over

these vast inland waters, unless its intent to do so has been expressed in the clearest terms. An examination of the treaties involved not only fails to disclose an intent to surrender national jurisdiction over this territory, but shows a clear intent to the contrary.

The present international boundary line between the United States and Canada was fixed pursuant to the Treaty with Great Britain, concluded on April 11th, 1908 and proclaimed on July 1, 1908 (35 Statutes at Large 2003). The preamble of this treaty is as follows (35 Stats. at L. 2003):

> "The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, being desirous of providing for the more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada, have for that purpose resolved to conclude a treaty, * * *."

The treaty then goes on to provide for the appointment of commissioners who shall fix the international boundary line by definite monuments and ranges, and who shall mark the same on charts, which shall be certified and signed and filed with their respective Governments. The commissioners actually completed their labors and reported pursuant to the Treaty on August 15, 1913. The location of the international boundary line as fixed by them is shown on the charts published by the War Department, Corps of Engineers. The boundary line in the neighborhood of Whitefish Bay, Michigan, is shown on Lake Superior Coast Chart No. 1 (Catalogue No. 91) issued by the War Department.

The treaty of January 11, 1909, between the United States and Great Britain, 36 Statutes at Large, 2448, provides as follows:

"PRELIMINARY ARTICLE.

For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

ARTICLE I.

The High Contracting parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, *subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.*

It is further agreed that so long as this treaty shall remain in force, *this same right of navigation shall extend to the waters of Lake Michigan* and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line." (Italics ours.)

The treaty then goes on to provide for certain limitations on the diversion or obstruction of the waters involved, and for the creation of an International Joint Commission whose consent shall be required for any obstruction or diversion on one side of the boundary which may interfere with the level or flow of the waters on the other side of the line.

We think it would be difficult for the average American to grasp the thought that Lake Michigan, which is entirely surrounded by United States territory, has the same international status as the high seas. Nevertheless, it is clear from the language above quoted that whatever cession of national sovereignty the treaty involved with respect to the waters of Lake Superior on the American side of the international boundary, applies equally to Lake Michigan.

We shall not pursue this line of discussion further, as we think the language of the treaty is too clear to permit of any possibility of misconstruction. The treaty clearly provides that both of the parties shall have the right to navigate freely throughout the waters of the Great Lakes, on either side of the international boundary line; and provides with equal clearness that vessels of one nation entering the territorial waters of another, are subject to the local laws, which, in this case, undoubtedly include the rule that all vessels must navigate with caution and at moderate speed in fog. The only limitation on the sovereignty of the United States, so far as concerns Canadian vessels, is that it shall not pass any law inconsistent with the free navigation of the waters in question by such vessels; and that it shall not pass any law which does not apply equally to the ships and citizens of both countries. There is not the slightest support in the treaty for the suggestion that the maritime law of the United

States is not effective on the Great Lakes up to the international boundary line. These waters remain a part of the United States and subject to its laws, just as much as New York harbor or the Mississippi River. The provisions of the Treaty of 1909 are, in substance, the same as are found in every treaty of commerce and navigation. They are not essentially different from the terms of Article 14 of the Treaty with Great Britain of November 19th, 1794 (8 Stat. 116), under which the inhabitants of Great Britain and the United States have the reciprocal right of navigating the ports and rivers of the two countries. It would scarcely have been suggested that this treaty interfered with the territorial jurisdiction of the United States, or of the State of New York, over the waters of New York Harbor; and yet such an argument could not be distinguished in principle from the argument which has been accepted in this case.

From the foregoing it follows that any liability for a tort committed in these waters is determined, both as to its existence and its extent, by the maritime law of the United States:

> "In *The Lottawanna,* Mr. Justice Bradley speaking for the court said: 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction". * * * One thing, however, is unquestionable; the Constitution must have re-

ferred to a system of law coextensive with, and operating uniformly in, the whole country.'" *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215.

In the case of *Slater* v. *Mexican National Railroad Company*, 194 U. S. 120, this Court, speaking of a tort liability, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent" (p. 126).

This is the universal rule.

Smith v. *Condry*, 1 How. 28, 32;
New York Central R. R. Co. v. *Chisholm*, 268 U. S. 29, 32;
Western Union Telegraph Company v. *Brown*, 234 U. S. 542;
American Banana Company v. *United Fruit Company*, 213 U. S. 347.

It is true, as pointed out by the Circuit Court of Appeals, that in *The Scotland*, 105 U. S. 24, 29, this Court held that when two vessels of the same nationality collide upon the high seas, the law enforced by our courts will be the law of their common flag. In that case this Court said:

> "In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws

of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect" (p. 29).

The basis of the different rule with respect to collisions on the high seas was clearly set forth, as follows:

> "But, if a collision occurs on the high seas, *where the law of no particular State has exclusive force,* but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly." (Italics ours, pp. 29, 30.)

The collision in this case does not fall within the rule of *The Scotland* because it did not occur "on the high seas, where the law of no particular State has exclusive force". Territorial jurisdiction over the waters of the Great Lakes has been fixed and divided between Canada and the United States by a certain boundary line through the lakes established by a succession of treaties. The first of these was the Treaty of Peace of 1783 (8 Statutes at Large 80); the last was the Treaty of 1908, referred to above.

The fact that the treaties have merely afforded reciprocal rights of freedom of transit and navigation to the respective nationals on either side of the international boundary on the waters of the Great Lakes and that this did not affect the territorial character of those waters has been uniformly recognized. In an opinion rendered with respect to fishing rights by Acting Secre-

tary of State Uhl, May 23, 1894, 194 MS. Dom. Let. 118, Moore's Digest of International Law, Vol. I, 672-3, it was said:

> "The conclusion is reached that the Great Lakes, whose waters separate the United States from the British Dominion of Canada are wholly territorial, and that the territorial jurisdiction of the respective sovereignties extends and is exercisable to the boundary which, by treaty, has been established between them as running through the middle of said lakes. This Government can neither claim nor admit that in the center of these lakes, on either side of the treaty boundary and up to a distance of one marine league from shore, there can be an area of 'high seas' in the determination of such a question as is presented."*

The learned Acting Secretary referred to the decision of this Court in *U. S.* v. *Rodgers*, 150 U. S. 249, holding that the Great Lakes are "high seas" within the meaning of the Federal Crimes Act, and that our courts have jurisdiction to punish an offense under that act committed on an American vessel though in Canadian waters; and pointed out that "it by no means follows that those waters are 'high seas' as regards territorial rights of the sovereignties which own their shores." The conclusion was reached that each country had full power to legislate with respect to fishing rights in waters on its side of the international boundary. The same situation has been recognized with respect to the right of

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* Although this statement was made prior to the Treaty of 1909, similar treaties for reciprocal rights in the navigation of territorial waters had been in force for many years. See for example: Treaty of November 19, 1794, Art. III (8 Stats. at L. 116); Treaty of May 8, 1871, Arts. XXVI, XXVII and XXVIII (17 Stats. at L. 863).

each country to legislate concerning wrecking privileges. Moore's Digest Int. Law, Vol. I, §142, pp. 684-691.

In Hyde on International Law (Volume 1, p. 268) it is stated:

> "the Great Lakes of Ontario, Erie, Huron and Superior, and their water communications constituting the boundary between the United States and Canada are wholly territorial".

Referring to the *Rodgers* case, the author says it is clear that this Court "did not intimate that those waters were not territorial". We think the accuracy of this statement is beyond question. The decision in the *Rodgers* case turned entirely on the interpretation of a federal statute. The power of Congress to enact the statute and of the courts to enforce it did not depend at all on the question whether the vessel involved was on the high seas or was within the territorial waters of Canada. The sole question was whether the Act was, by its terms, applicable to the place where the crime was committed. Speaking of vessels navigating the Detroit River, the Court said (at p. 260):

> "In traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, *so far as transactions had on board are concerned*, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong." (Italics ours.)

From the language which immediately follows, it is clear that the foregoing statement was not based upon any peculiarity in the status of the Great Lakes, but

was deemed to apply generally to vessels in foreign waters. This further appears from the citation by the Court, as authority for the statement, of *Wildenhus's Case,* 120 U. S. 1, 12. That case involved the applicability of Belgian law to a crime committed on a Belgian ship in New York harbor, in the territorial waters of New Jersey. The case establishes not only that the statement above quoted was considered generally applicable, but confirms also the limitations of the doctrine; for in *Wildenhus's Case,* at page 12, it was said:

> "And so by comity it came to be generally understood among civilized nations that *all matters of discipline and all things done on board which affected only the vessel or those belonging to her,* and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require." (Italics ours.)

A very interesting discussion of this entire question is contained in an article entitled "How the Great Lakes became 'High Seas' and Their Status Viewed from the Standpoint of International Law", by Harry E. Hunt, which appears in Volume 4 of the American Journal of International Law, at page 285. While we do not concur in all of the author's conclusions, the article contains a helpful review of the authorities, and some very interesting comments. The following passage (p. 311) is worthy of careful consideration:

> "The puzzle is, how the United States can con-

vert the Great Lakes into 'high seas' when only a part of them are within its jurisdiction. We are aware of no Canadian legislation or decision altering the Canadian division of the Great Lakes in conformity to the American view. Clearly the United States has no power in the premises."

The article also directs attention to the fact that the several states bordering on the Great Lakes have territorial jurisdiction over the adjacent waters as far as the international boundary line. The collision in the present case, for example, occurred within what was originally a part of the State of Michigan. *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 436-7. Certainly that State has never surrendered its general jurisdiction over the waters in question. *U. S.* v. *Bevans*, 3 Wheat. 336, 388-9.

The Circuit Court of Appeals was, therefore, quite unjustified in applying the rule of *The Scotland*, which is based on the assumption that the collision has occurred "where the law of no particular State has exclusive force". The case falls squarely within the general principle first cited, that "the only source of this obligation is the law of the place of the act" which "determines not merely the existence of the obligation * * * but equally determines its extent." (*Slater* v. *Mexican National Railroad Company, supra.*)

The Circuit Court of Appeals cited the case of *The Eagle*, 8 Wall. 15, as authority for the proposition that collisions occurring on the waters of the Great Lakes are to be dealt with as though on the high seas. That was an action by the owner of a brig *in rem* against a towing vessel to recover damages for negligent stranding

and incidental collision with another vessel in tow, which occurred on the Canadian side of the Detroit River. It was urged that as the Canadian law afforded no remedy in the nature of a maritime lien on the vessel herself, no such relief could be afforded in the admiralty courts of the United States. Speaking of the trial of the case in the court below, this Court said:

> "It was tried there, as it should have been tried, according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law" (p. 22).

This Court certainly did not question the fact that the waters in which the collision happened were subject to Canadian law; and it is clear that the decision would have been the same if the collision had happened in the territorial waters of any other country. Having decided that it had jurisdiction of the case, the Court apparently considered that the question whether the proceeding should be *in rem* or *in personam* was a matter of procedure which was not affected by the local law. In any event, the decision may readily be sustained on the ground which this Court stated a year later in *The Maggie Hammond* (9 Wall. 435, 451), as follows:

> "Maritime liens are of little or no value, in a country where there are no appropriate tribunals for their enforcement, as they must remain dormant and unavailable, but the denial of such jurisdiction to her admiralty courts, by one country, whether it be by legislation or by the prohibitions of her common law courts, cannot have the effect to impair or diminish the jurisdiction in such cases of the admiralty courts of any other country, if they are legally clothed with the power and authority to en-

force such remedies for the breach of a maritime contract."

There may be some difficulty in reconciling the statement above quoted with the recent decisions of this Court as to the nature of the maritime law, notably in the *Western Maid* (*infra*, p. 30). If any such inconsistency exists, however, it can have no bearing on the question now under discussion, *i. e.*, on what theory this Court proceeded in deciding *The Eagle*.

The Circuit Court of Appeals also cites the case of *The Avon*, Fed. Cas. No. 680 (Vol. 2, p. 255), a decision of the Circuit Court for the Northern District of Ohio. That case arose out of a collision in the Welland Canal between the Canadian steamer "Avon" and the American schooner "Medbury". After the "Avon" had been sold in Canada to a Canadian purchaser, for value and without notice of the collision claim, she was libeled in an American port. The proceeding was *in rem* and it appeared that the Canadian law allowed no such proceeding and recognized no maritime lien arising from the collision. The court conceded the exclusive national jurisdiction of Canada over the Welland Canal; and conceded that the Canadian Government, by express statutory enactment, could have negatived any such lien. Nevertheless, it gave judgment for the libellant on the theory that the general maritime law applies on all navigable waters unless expressly altered by the local sovereignty. The decision appears to have proceeded on the same theory set forth in the passage above quoted from *The Maggie Hammond*.

The West Cherow, 276 F. 585 (E. D. Va.) involved a collision between an American steamer and a Dutch steamer in an open roadstead within the territorial

waters of Portugal. It was contended that the Portuguese law afforded no proceeding *in rem* but the court sustained such a proceeding on the ground that although Portuguese law did not afford the same remedy as the American law, it apparently recognized the same right. We quote from the opinion as follows (at p. 589):

> "It may be true, under the laws of Portugal, that a proceeding *in rem* against the *res* is not specifically provided for in its admiralty courts in that country, designated 'courts of commerce', as prevails among maritime nations generally; yet the right to a lien, or rather to reach and hold liable the vessel itself, for maritime torts arising from collision, such as is recognized by the maritime law common to all civilized nations, is apparently acknowledged."

Accordingly this case also involved a mere question of procedure.

The case of *The Kaiser Wilhelm der Grosse*, 175 F. 215, has no bearing on the question here involved. It is apparently cited for a *dictum* by Judge Hough, to the effect that the waters within a marine league of the French coast might be subject to the territorial jurisdiction of France and still be a part of the high seas. This appears to be merely a matter of terminology.

We desire to call attention at this point to certain considerations which apply to all of the above cases. It will be noted that in all of them the court assumed jurisdiction; and in all of them the court applied what it conceived to be the general maritime law to collisions happening outside the territorial waters of the United States. We submit that the action of the courts in those cases in taking jurisdiction of collisions arising outside

their own territorial waters, affords no support for the argument that they should refuse to take jurisdiction of a collision occurring within those waters.

Innumerable cases can be cited where the admiralty courts of the United States have taken jurisdiction of collisions which occurred on the high seas or in foreign territorial waters; but no case can be cited in which they have declined jurisdiction of a collision which occurred in American territorial waters. Indeed, we have been unable to find any case in which the admiralty courts of the United States have declined jurisdiction of a collision which occurred anywhere in the world.

Apparently, the British admiralty courts have followed the same practice, as appears from the following statement in Marsden's Collisions at Sea, 8th Ed. at page 216:

> "Actions for collision are said to be *communis juris*, and the Admiralty Court never refused to entertain an action merely because both ships were foreign, or their owners not British subjects, or because the collision occurred in foreign waters."

POINT II.

In cases of collision occurring within the territorial limits of the United States, the admiralty jurisdiction conferred upon the District Courts is positive and mandatory and there is no discretion to decline jurisdiction in such a case even though the parties are not citizens of the United States.

The admiralty jurisdiction of the United States Courts is conferred by Article III, Section 2, Clause 1 of the

Constitution. The pertinent provisions of that clause are as follows:

> "The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction."

The jurisdiction of the United States District Court is conferred and defined by Act of Congress. Section 24 of the Judicial Code as amended (U. S. Code, Tit. 28, Sec. 41), provides, in part, as follows:

> "*Original Jurisdiction.* The district courts shall have original jurisdiction as follows:
>
> * * * * * * *
>
> Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it * * *."

This is a clear and definite and positive delegation by Congress to the United States District Courts of jurisdiction in all admiralty cases to which the legislative and judicial jurisdiction of the United States rightly extends, namely, all cases arising within its territorial limits. By its terms no discretion is vested in the District Court to decline jurisdiction in such a case regardless of who the parties may be.

As to causes arising under the laws of the United States the delegation of jurisdiction is of course full and complete. The fact that as to causes arising outside our territorial limits, jurisdiction is exercised as a matter of comity only and within the court's sound discretion, in no way affects the positive delegation of jurisdiction with respect to admiralty causes of action arising within our territorial limits and under our laws.

It is the universal rule that the vesting of jurisdiction in a court by the Legislature creates a duty on the

part of the Court to take and exercise the jurisdiction which is granted.

In the Second Employers'. Liability cases, this Court said:

> *"The existence of the jurisdiction creates an implication of duty to exercise it,* and that its exercise may be onerous does not militate against that implication * * *.
>
> "We conclude that rights arising under the act in question may be enforced, *as of right,* in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." Second Employers' Liability Cases, 223 U. S. 1, 58-9. (Italics ours.)

In the case of *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264, 403, this Court said:

> "It is most true, that this court will not take jurisdiction if it should not: but *it is equally true that it must take jurisdiction, if it should.* The judiciary cannot, as the Legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this

tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one." (Italics ours.)

See also:

Raich v. *Truax et al.*, 219 Fed. 273, 285;
Gregonis v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152.

This Court has dealt with the identical question in another line of cases involving the conflict of jurisdiction with, or the concurrent jurisdiction of, the State Courts. In the case of *Chicot County* v. *Sherwood*, 148 U. S. 529, 534, this Court said:

"But the Courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam* v. *Broadnox*, 14 Peters 67; *Union Bank* v. *Jollys Administrators*, 18 How. 503."

Similar decisions are:

McClellan v. *Carland*, 217 U. S. 268, 282;
Kline v. *Burke Construction Co.*, 260 U. S. 226, 234;
Hyde et al. v. *Stone*, 20 How. 170, 175.

This Court applied the same principle in the field of criminal law, in *Ex Parte U. S.* (242 U. S. 27), where it decided that the Federal Courts had no power to suspend sentence. After pointing out that the courts have discre-

tion in exerting their authority, this Court said, (at p. 42):

> "But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so."

And again, after pointing out that the practice in question arose from humane motives and was continued with the approval of the prosecuting officers, this Court said (pp. 51-2):

> "Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution."

In conferring on the District Courts jurisdiction of causes in admiralty, Congress placed no limiting provision. Even citizens of the same State in causes involving small amounts may sue each other in the District Court if the cause is one of admiralty. Similarly, Congress forebore to place any restriction on suits by, against or between foreigners and gave to the District Courts full and complete jurisdiction of causes in admiralty, regardless of parties.

Since Congress conferred this broad power, it is the duty of the District Courts to exercise the power granted and afford redress to suitors before them in every case to which the legislative jurisdiction extends, namely, to

all cases arising within the territorial limits of the United States and from a breach of United States law. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. These libellants had the right to select this forum in which to have their rights adjudicated, and it was the duty of the District Court to hear their complaints and determine the issues involved.

The District Judge in his opinion (R. 133-6, 142) placed emphasis on the following language used by this Court in its recent opinion in the cases of *Charter Shipping Co., Ltd.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515, 517:

> "The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. *The Belgenland*, 114 U. S. 355, 368; *The Maggie Hammond*, 9 Wall. 435, 457."

A similar statement is found in the opinion in *Langnes* v. *Green*, 282 U. S. 531, 544. The citations appended to the Court's statement, however, show clearly that the Court was merely restating the rule laid down in the case of *The Belgenland*, 114 U. S. 355, which is expressly limited to "controversies between foreigners *in cases not arising in the country of the forum*"* (p. 363) or, as stated at another point in the opinion, "cases arising *beyond the territorial jurisdiction* of the country to which the courts belong"* (p. 365). *The Belgenland* was a case of collision occurring on the high seas, between a Norwegian barque and a Belgian steamship. Neverthe-

* Italics ours.

less, the actual decision was that the courts of the United States should retain jurisdiction. The following passage from the opinion (at p. 365) is significant:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged."

The Maggie Hammond, 9 Wall. 435, 457, was an action for breach of a contract for the carriage of goods between foreign ports. The case is particularly interesting here because the suit was brought by a Canadian against a Canadian vessel for breach of a contract, made in Scotland, for the carriage of goods from that country to Montreal. Nevertheless, the decision of this Court was that jurisdiction should be retained. The remarks of this Court in *The Maggie Hammond*, to the effect that the jurisdiction was not obligatory, clearly related to a case, like the one before it, where the cause of action arose outside the territorial limits of the United States.

The Charter Shipping Company case was a suit for the recovery of general average deposits asserted to have been illegally exacted from the libellant in London. Although the voyage originated in the United States, there was no question but that British law was applicable and this Court pointed out that the suit involved "the application of English law to the fund located there", holding that in such a cause retention of jurisdiction in a suit in ad-

miralty between foreigners was within the discretion of the Court. Obviously, the case called for no extension of the principles enunciated in *The Belgenland,* and we do not believe that any was intended. In the case of *Langnes* v. *Green,* the Court was merely citing an analogous principle and the point was not involved. It is even more clear in that case that no extension of the principle of *The Belgenland* was intended. The Circuit Court of Appeals was clearly influenced by this, we believe erroneous, view of the effect of the passages referred to in this Court's opinions in the *Charter Shipping* and *Langnes* cases (R. 105, 106) but forebore to rest its decision on this ground.

There is in fact no basis for suggesting that jurisdiction should be discretionary with respect to a collision occurring within the territorial limits of this country. The act is wrongful and gives rise to a cause of action only because of the laws of this country. The cause of action arises out of the law of this country and as a result of a breach of its laws. Our courts have criminal as well as civil jurisdiction of offenses at the point at which the collision occurred. The violations of law which contributed to this collision are a breach of our peace and of the security which our laws guarantee to the strangers within our gates, as well as to our own citizens. In Brown on Jurisdiction, Second Edition, page 22, the author says:

> "All judicial power flows from the state, and the grant of legislative power ceases at the line of the state. Judicial power must cease also at that point; *but within the state the power is complete, not only over its citizens, but over the citizens of other states, or of foreigners within its*

borders, even when passing through the state, the laws necessarily protecting its own citizens against the stranger's wrongful acts, and him also while within its borders. It will also give redress for any grievance he has received while passing through, either from citizens or aliens, and enforce any other right he may have, giving him the same relief he would be entitled to were he a citizen. While, therefore, the laws of the state act with equality toward all, throwing open the doors of the courts for the protection of the stranger and citizen alike, it justly requires that the protected party should respect the laws of the country that he or they have chosen to pass through or sojourn in. The laws of the state even concede to the stranger the rights of citizens. One non-resident may sue another non-resident of the state, even upon a cause of action transient in its nature" (pp. 22-23). (Italics ours.)

In connection with the foregoing quotation, the author appended the following footnote:

> "Story on Conflict of Laws, sec. 541. *The general rule of law is, both in England and the United States, that all aliens can bring suits against citizens, or even against other aliens, in all cases where the cause of action arises in the United States;* or, if it be a transitory action, arising anywhere. *Peabody* v. *Hamilton,* 106 Mass. 220." (Italics ours.)

In Story on Conflict of Laws, 8th Ed., page 754, the following statement appears:

> "Vattel lays down the true doctrine in clear terms. 'The sovereignty,' says he, 'united to domain, establishes the jurisdiction of the nation

> in its territories, or the country which belongs to it. It is its province or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.'"

As stated by Honorable Elihu Root, in his opening address as President of the American Society of International Law, in April, 1910:

> "The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization," 4 American Journal of International Law, 521.

The Circuit Court of Appeals thought it unnecessary to decide whether the District Court could have declined jurisdiction in a case where "the law of the forum is the law determining the rights and obligations of the parties". It held that this question did not arise because the present case was not governable by the laws of the United States. This conclusion was apparently based on *The Eagle, supra, The Avon, supra,* and similar cases. At most these cases tend to support the argument that the present case is governed by the general maritime law; but as this Court has pointed out, there is no such thing as general maritime law, excepting as it forms part of the law of some sovereign state. Undoubtedly, the law which prevails on the Great Lakes is the general maritime law, excepting as modified by statute, but each nation has its own conception of the general maritime

law and applies it accordingly. In the present case the law applicable is undoubtedly the general maritime law as understood and administered by the courts of the United States, and as modified by Congress. As said by this Court in *The Western Maid*, 257 U. S. 419, 432:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been acepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by a foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules."

Within the territorial limits of the United States there can be no law excepting the law of the United States.

As this Court pointed out in *United States* v. *Bevans* (3 Wheat. 336, 388), jurisdiction is "the power of exclusive legislation". In certain cases the United States may choose not to enforce its law, as in the case of foreign sovereigns, their ambassadors and other diplomatic representatives. So too it may refrain from interference in the internal affairs of a privately owned foreign vessel, as in the case of suits for wages by foreign seaman. Where the cause of action arises in American waters and under American law however, it was recently held by the United States District Court for the Eastern District of Virginia, that jurisdiction was mandatory, even in an action by a foreign seaman for injuries sustained on a foreign vessel. *The Apurimac*, 7 F. (2d) 741. The Cir-

cuit Court of Appeals affirmed on the ground that the jurisdiction was discretionary but was properly exercised. *Heredia* v. *Davies*, 12 F. (2d) 500. We submit that the decision of the District Court was sound; but in any event, as this Court pointed out (at p. 364) in *The Belgenland, supra*, "the case of foreign seamen is undoubtedly a special one * * *." See also *Uravic* v. *Jarka Co.*, 282 U. S. 234, at page 240.

Conversely, in matters relating to the internal discipline of the ship, American law, both civil and criminal, is sometimes applied to acts done on board American vessels in foreign waters.

U. S. v. *Rodgers*, 150 U. S. 249;
Thompson Towing & Wrecking Assn. et al. v. *McGregor et al.*, 207 Fed. 209.

The basis for these decisions is very clearly set forth in the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashford of August, 1842, which was quoted by this Court with approval in the *Rodgers* case, *supra*, at pages 264-5. Mr. Webster pointed out that the jurisdiction and laws of a nation accompany her ships into foreign ports "for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof * * *." He conceded, however, that "for any unlawful acts done by her while thus lying in port * * * she * * * must doubtless be answerable to the laws of the place".

We do not dispute the principle as above stated and qualified, but it clearly has no application to the present case. These petitioners were not related contractually or otherwise to the "Mantadoc"; they were entire strangers to her, *their cargo being on another vessel.* Their only remedy is in tort, and under American law.

It is objected that the American law is more favorable to these petitioners than Canadian law. Under the law of the United States the "Mantadoc" is liable for the full amount of the petitioners' damages, while her liability under Canadian law is said to be for only one half of the damages. This may be a good reason for the respondent's desire to escape the jurisdiction of the United States courts, but it is a curious argument to use in urging those courts to abdicate their jurisdiction. Almost invariably one party or the other would gain some advantage if the court should decline jurisdiction.

As stated above, the law governing this collision can only be the law of the United States. Once this point is established, we think it is unnecessary to determine what particular rule of law governs the case. That is a matter which must await a trial on the merits. The only point material here is that the petitioners base their claim on a violation of United States law in United States territory, and seek redress in the United States courts.

In this situation we submit that the jurisdiction of the Court is not affected by the nationality of the parties or by the nationality of the vessels involved. We quote as follows from the opinion of this Court in the case of *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100 at pages 123-4:

> "In support of their contention the defendants refer to the statement sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor.
>
> * * * * * * * * *
>
> A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The ju-

> risdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

We think it is clear that the discretion mentioned in the above quotation is to be exercised by the Congress or by the treaty-making power, and not by the courts. The situation is quite different where our courts are asked to enforce the laws of a foreign country. They do so only as a matter of comity; and they may, in their discretion, decline to do so. In the enforcement of the laws of their own country, however, the courts have no discretion to give or withhold relief according to considerations of convenience or nationality. Their duty is to administer justice in all cases over which they have jurisdiction. It is not for them to consider whether some other system of law might be more consonant with abstract justice. Furthermore, in the present case, the presumption is that in any suit by these petitioners against the respondent in the Canadian courts, those courts would apply the substantive law of the United States. This would seem to follow necessarily from the decision in the case of *The Eagle Point* (142 Fed. 453, certiorari denied, 201 U. S. 644) which the respondent cites in its brief in opposition to certiorari. In that case the Circuit Court of Appeals for the Third Circuit decided that the question whether one of two colliding vessels is liable to cargo of the other for full or half damages, is a question of right and not of remedy. If

this is a matter of right, it would seem that the Canadian courts must apply the law of the United States, in this case, since they will presumably recognize that Canadian law cannot be given extra-territorial force so as to govern a tort committed in the territory of the United States. Accordingly, it would follow that, just as the United States courts applied British law in the case of *The Eagle Point,* so the Canadian courts would apply the law of the United States in the present case.

The foregoing is not a mere argument of expediency but is based on our understanding of the actual state of the Canadian law. In this connection, we refer the Court to the Canada Shipping Act, Chap. 113 of the Revised Statutes, 1906, Sections 913 and 919. We think it is clear from these sections that the Canadian Parliament does not purport or attempt to exercise jurisdiction on the American side of the international boundary.

The present case, therefore, presents the extraordinary spectacle of the United States Courts declining to enforce their own law, and remitting the petitioners to the courts of another jurisdiction, where the applicable law (*i. e.,* the maritime law of the United States) will only be enforced, if at all, as a matter of comity, and must be proved by expert witnesses from the United States. To say that there is no precedent for such a decision, is to state the situation very mildly. The rule applied in the lower courts would introduce in the United States, by judicial decision, a principle of extra-territoriality, the converse of that which prevails by treaty in China. There foreigners are not bound to have their rights determined by the local courts; here they are not entitled to do so. Such is clearly not the law. By the Fourteenth Amendment to the Constitution of the United States, and by Section 1977 of the Revised Statutes (U. S. Code, Tit. 8,

sec. 41) all persons, whether citizens or aliens, are entitled to the equal protection of the laws in respect of matters arising within the territory of the United States.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, this Court quoted the language of the Fourteenth Amendment and said:

> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by Sec. 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

It may be that Section 41, Title 8, of the United States Code is not in terms binding on the Federal Courts; but it is scarcely to be supposed that the government of the United States intended to countenance in its own courts a form of discrimination which it expressly prohibited in the courts of the States.

The Treaty of 1909, upon which the lower courts

base their refusal to entertain jurisdiction, affords a powerful if not a conclusive argument against their decision. That treaty expressly stipulates that the laws of the United States, on its own side of the boundary line, shall apply "equally and without discrimination to the inhabitants, ships, vessels and boats of both countries". It is conceded that, if the petitioners were Americans, they would be entitled to the relief which they ask; it is denied to them only because they are Canadians. To say that the lack of equality is not in the law but in the enforcement of the law, is a mere quibble, which does not require discussion in this Court.

The fact that the courts to which the petitioners are relegated happen to be the courts of their own country, is immaterial. Those courts are under no obligation to enforce the laws of the United States; and, indeed, this case has been decided on the assumption that they will not do so. It is entirely conceivable (although we admit improbable) that the Canadian courts would decline to take jurisdiction of the present controversy. In any event the courts of the United States cannot abdicate their function of enforcing their own maritime law, on the assumption that some other jurisdiction will, as a matter of comity, afford the petitioners relief.

Conclusion.

The decrees of the Circuit Court of Appeals herein should be reversed and the causes remanded to the District Court with instructions to enter decrees overruling the exceptions to the libels, dismissing the suggestions as to jurisdiction, denying the respondent's motions for dismissal and ordering respondent to file answers to the libels.

February 1, 1932, New York City.

Respectfully submitted,

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